# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 40

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, AS SUCCESSOR BY MERGER TO INTERNATIONAL FUR & LEATHER WORKERS UNION OF UNITED STATES AND CANADA, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD AND LANNOM MANUFACTURING COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MOTION TO POSTPONE ARGUMENT

The Solicitor General, on behalf of the National Labor Relations Board, respectfully files this motion, under Rule 43 (4) of the Revised Rules of this Court, to postpone the argument of this case, which is tentatively scheduled to be heard at the November session. The reasons on which this motion is based are as follows:

In the instant case the Court of Appeals for the Sixth Circuit has held that petitioner union is ineligible to receive benefits under the National Labor

Relations Act because the union's president, Gold, had been convicted in the United States District Court for the District of Columbia of filing a false non-Communist affidavit under Section 9 (h) of the Act. Accordingly, that court dismissed the Board's petition for enforcement of its unfair labor practice order against the respondent, Lannom Manufacturing Company, on the ground that the Board's complaint and order had been entered on a charge filed by a non-complying union. On March 9, 1956, subsequent to the decision below in the instant case, the Court of Appeals for the District of Columbia Circuit, sitting *en banc,* affirmed Gold's conviction by an equally divided vote. On October 8, 1956, this Court granted Gold's petition for certiorari to review the validity of his conviction. No. 137, *Gold* v. *United States.*

The grant of certiorari in No. 137 suggests the possibility that Gold's conviction of filing a non-Communist affidavit may be reversed. If that should occur, the premise on which the Sixth Circuit decided the instant case would be swept aside. Reversal of Gold's conviction would, therefore, have the practical effect of mooting the issues raised by the instant appeal. In that eventuality, presumably the appropriate disposition of the present case would be a reversal and remand to the Court of Appeals for the Sixth Circuit for further proceedings in light of the reversal of Gold's conviction.

This Court's review of the *Gold* case may thus result in a disposition which would render academic the issues presented in the instant case. It is sug-

gested, therefore, that the Court may deem it appropriate to postpone further consideration of the present case until the status of Gold's conviction is finally determined in No. 137.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

THEOPHIL C. KAMMHOLZ,
*General Counsel,*
*National Labor Relations Board.*

OCTOBER 1956.

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JOHN T. FEY,

IN THE

# Supreme Court of the United States

**October Term, 1956**

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AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as Successor by Merger to International Fur & Leather Workers Union of United States and Canada,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD and LANNOM MANUFACTURING COMPANY.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## RESPONSE TO MOTION TO POSTPONE ARGUMENT

Petitioner submits that the Solicitor General's motion establishes the error of the Sixth Circuit's order, and that the motion to postpone should therefore be disposed of by a *per curiam* reversal of the order below without argument. If argument is deemed necessary, the motion to postpone should be denied.

As the brief which petitioner has filed herein points out, decompliance of a union—apart from the fact that it is not authorized by the statute nor supported by the legislative history—is a thoroughly impractical sanction for a false §9 (h) affidavit. The purpose of the statute to facilitate the resolution of representation disputes and the prevention of unfair labor practices is vitiated if Board or judi-

cial proceedings must await the collateral processes of the criminal law to determine whether an election should be held, a complaint issued or, as here, a reinstatement order enforced (Petitioner's Brief, at pp. 16-19).

Gold's appeal from the conviction was pending undetermined before the District of Columbia Circuit when, in December, 1954, the case was argued before and, in October, 1955, decided by, the Sixth Circuit. During this time enforcement of the Board's reinstatement order against the employer was in abeyance. Despite the possibility, recognized by the Sixth Circuit (R. 20), that the conviction might be set aside, it upheld the Board's position that the union should be decomplied retroactively to 1950 because of the conviction. The present motion demonstrates the error of that holding.

1. If *Gold* (No. 137, this Term) should result in an acquittal: (a) the injury to the union and to the workers who, the Board has found, were unlawfully discharged in 1951, will have been aggravated by the continued decompliance of the union because of the unjust conviction of a former officer; and (b) the imperative issue presented by this case will nevertheless not be mooted, but will remain for decision of the Court at this Term because of the *Mine, Mill and Smelter Union* case (No. 57, this Term) which is now set for argument with this case and which has nothing to do with Gold's conviction. The Mine-Mill case presents for review the District of Columbia Circuit's holdings, which the Sixth Circuit rejected in this case, that the remedy for a false § 9(h) affidavit is punishment of the affiant not decompliance of the union.

2. *Gold* cannot be argued until after the Court reconvenes in January, 1957. If, instead of an acquittal, it should result in a new trial, the logic of the present motion would suggest that this case should then await the outcome of that trial, possible new review, etc. Under the theory of the

ruling below and of the motion, it could thus easily be 1960 before the union's 1950-1-2 compliance status could be determined.

3. If Gold's conviction should be affirmed, the question will still remain whether the punishment of a union by decompliance and its members by the denial of protection against unfair labor practices because of the conviction of an officer of having filed a false affidavit is not "as reckless as firing a shot-gun into a crowd of people in an effort to stop one who is picking their pockets." *Farmer* v. *United Electrical Workers,* 211 F. 2d, at p. 39.

The grant of certiorari in *Gold* therefore does not affect the urgency of the underlying issue or its ripeness for decision.

The motion to postpone is in effect an acknowledgment that the Sixth Circuit's order was erroneous. That order should be reversed *per curiam* without argument; alternatively, the motion should be denied.

October 16, 1956.

Respectfully submitted,

HAROLD I. CAMMER,
*Attorney for Petitioner.*

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*v.*

NATIONAL LABOR RELATIONS BOARD AND LANNOM MANUFACTURING COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINION BELOW

The opinion of the court below (R. 13–22), filed October 6, 1955, is reported at 226 F. 2d 194.

### JURISDICTION

The order of the court dismissing the Board's enforcement petition was entered on October 6, 1955 (R. 12). On December 19, 1955, by order of Mr. Justice Reed, the time for filing a petition for a writ of certiorari was extended to and including March 3, 1956 (R. 85). The petition for a writ of certiorari was filed on March 1, 1956, and was granted on

April 23, 1956. The jurisdiction of the Court rests on 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended.

## QUESTIONS PRESENTED

1. Whether an unfair labor practice order of the National Labor Relations Board is rendered invalid when an officer of the union which filed the unfair labor practice charge is convicted, in separate criminal proceedings, of having filed a false non-Communist affidavit under Section 9 (h) of the National Labor Relations Act, as amended.

2. Whether the court below was nonetheless required to disregard the conviction because the District Court for the District of Columbia, in an earlier suit brought by the union against the Board but not involving the employer herein, had held that the Board lacked power under the Act to alter the union's compliance status on account of the officer's conviction, and had issued a preliminary injunction enjoining the Board from doing so.

## STATUTE INVOLVED

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 65 Stat. 601, 602, 29 U. S. C. 159 (h), provides:

### REPRESENTATIVES AND ELECTIONS

SEC. 9 * * *

* * * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of

this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

## STATEMENT

The court below dismissed the Board's petition to enforce the unfair labor order which it had issued against Lannom Manufacturing Company (R. 22–27; 103 N. L. R. B. 847), on the ground that the proceeding was invalidated by the supervening conviction of Ben Gold, an officer of the union which had initiated the proceeding, for having filed a false non-Communist affidavit under Section 9 (h) of the Act. The underlying facts may be summarized as follows:

### 1. *The Board unfair labor practice proceeding*

On April 18, 1951, the International Fur and Leather Workers Union (the "Union")[1] filed a charge

[1] This union merged with petitioner Amalgamated Meat Cutters in February, 1955 (Pet. for cert., fn. 1).

with the Board, alleging that Lannom Manufacturing Company ("Lannom") had discriminated against and restrained its employees in the exercise of their organizational rights, in violation of Sections 8 (a) (1) and (3) of the Act (R. 43). This charge was amended, without substantial change, on June 18, 1951, November 13, 1951, and February 18, 1952 (R. 44–46). On February 27, 1952, the Regional Director of the Board issued a complaint based on the charges (R. 38–41).

At the hearing before the Trial Examiner, Lannom sought to prove that the Section 9 (h) affidavits filed with the Board by certain officers of the Union, including President Ben Gold, were false (R. 34–36). Gold had filed his first affidavit on or about August 30, 1950, and had filed affidavits of similar import annually thereafter (R. 3–4). The Trial Examiner, pursuant to the Board's view that questions of compliance with Section 9 (h) are for the Board's administrative determination and may not be litigated by the parties in unfair labor practice or representation proceedings,[2] declined to permit Lannom to go into the compliance issue (R. 36–37, 50).

On July 3, 1952, the Trial Examiner issued his intermediate report, finding that Lannom had violated Sections 8 (a) (1) and (3) of the Act, and recommending that an appropriate remedial order issue (R. 49–84). On March 20, 1953, the Board, with some modification, sustained the Trial Examiner's

[2] See *Lion Oil Co.*, 76 N. L. R. B. 565, 566; *Coca-Cola Bottling Co. of Louisville, Inc.*, 108 N. L. R. B. 490, 491.

findings and issued a remedial order against Lannom (R. 22–27). The Board specifically affirmed the Trial Examiner's rejection of Lannom's evidence on the Union's alleged noncompliance with Section 9 (h), adding (R. 23, fn. 2):

> We are administratively satisfied that the Union was in compliance with Section 9 (h) at all times relevant hereto. See *American Cable & Radio Corporation,* 102 N. L. R. B. [877]. See also, *United Tanners, Inc.,* 103 N. L. R. B. [761, fn. 3]

In the cited cases, the Board indicated that, prompted by the refusal of Gold and certain other union officers to acknowledge before a grand jury the veracity of their Section 9 (h) affidavits, it had administratively requested these officers to reaffirm their affidavits, but that such action had been enjoined, as beyond the Board's statutory authority, by the District Court for the District of Columbia.[8]

2. *The falsity of Union Officer Gold's affidavit is established in criminal proceedings*

In August 1953, an indictment under 18 U. S. C. 1001 was returned against Union Officer Gold in the District Court for the District of Columbia, charging that the non-Communist affidavit which he filed with the Board on August 30, 1950 was false. On April 30, 1954, Gold was convicted on two counts of

[8] *United Electrical Workers, et al.* v. *Herzog*, 110 F. Supp. 220, affirmed, *sub. nom. Farmer* v. *United Electrical Workers*, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943.

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this indictment, and a fine and prison sentence were thereafter imposed on him (R. 4–5, 10).[4]

Because of Gold's conviction, the Board, on May 28, 1954, administratively ordered the Union to show cause why its compliance status under the Act should not be altered unless Gold were removed from office. When the Union responded, *inter alia,* by reelecting Gold to a new term as president, the Board entered an order declaring the union to be out of compliance with Section 9 (h) (R. 5, 10–11). *Compliance Status of International Fur & Leather Workers Union,* 108 N. L. R. B. 1190.

The Union thereupon obtained from the District Court for the District of Columbia a preliminary injunction, which was thereafter affirmed on appeal, enjoining the Board from altering or restricting the Union's compliance status under the Act by reason of Gold's conviction (R. 5, 8–9). *Fur Workers Union* v. *Farmer,* 34 L. R. R. M. 2493 (July 20, 1954), affirmed, 221 F. 2d 862 (C. A. D. C., February 15, 1955).

3. *The enforcement proceeding in the court below*

On September 10, 1954, after the Court of Appeals for the District of Columbia Circuit had denied the Board's request for a stay of the preliminary injunction pending disposition of the Board's appeal therefrom, the Board petitioned the court below, pursuant to Section 10 (e) of the Act, for enforce-

[4] Gold was placed on bail pending appeal. On March 9, 1956, the conviction was sustained by an equally divided vote of the Court of Appeals for the District of Columbia Circuit, sitting en banc, and, on October 8, 1956, this Court granted Gold's petition for certiorari, No. 137, this Term. After the grant of certiorari, the Board moved to have the argument in the instant case postponed pending the Court's decision in the conviction case, but, on October 22, 1956, the Court denied this motion.

ment of the unfair labor practice order, described *supra*, pp. 4–5, which it had issued against Lannom (R. 29–30). Shortly thereafter the Board, being advised by Lannom that it intended to challenge the sufficiency of the Union's compliance with Section 9 (h), filed a supplement to its enforcement petition, setting forth the facts respecting Gold's conviction and the injunction issued by the District of Columbia court which had blocked the Board's cancellation of the compliance status of the Union (R. 3–5).

Lannom thereupon moved to dismiss the Board's enforcement petition because it disclosed on its face that Union Officer Gold had filed false Section 9 (h) affidavits, and that the charging Union was thus not in full compliance with that Section at all times relevant to the unfair labor practice proceeding (R. 1). The Union was permitted to intervene, and opposed the motion to dismiss (R. 2–3).

On October 6, 1955, after hearing argument by all parties, the court below granted Lannom's motion to dismiss the Board's petition for enforcement (R. 12). A majority of the court, indicating its disagreement with the view of the District of Columbia courts that the veracity of a Section 9 (h) affidavit is irrelevant to the Board's inquiry (R. 16–17), concluded that "as a matter of law, the 1950 affidavit of Gold and his subsequent conviction affirmatively show on the present record in this case a lack of compliance on the part of the charging union on August 30, 1950 and for such time thereafter as such conditions continued to exist" (R. 18–19). Rejecting the Union's contention that the conviction, in any event, merely involved Gold's

1950 affidavit, whereas the complaint was issued on the basis of Gold's subsequent 1951 affidavit, the court added that, considering "the falsity of the 1950 affidavit and the nature of the Communist Party," the "renewal affidavit in 1951, unsupported by any alleged change in the factual situation," did not rebut the reasonable presumption that Gold had continued his membership in the Communist Party (R. 19–20).

Judge Stewart dissented on this last point, concluding that the conviction on Gold's 1950 affidavit was insufficient to warrant an inference as to the falsity of his 1951 affidavit (R. 21–22).

## SUMMARY OF ARGUMENT

### I

The Union's initial contention, that the sole consequence under the Act of a false non-Communist affidavit is a criminal penalty for the guilty union officer and that it has no effect on the union's right to Board benefits, is dealt with in our brief in the companion case, *Leedom* v. *International Union of Mine, Mill and Smelter Workers,* No. 57. The arguments presented in that brief are fully applicable here. They demonstrate, we believe, that Congress adopted the technique of having union officers file non-Communist affidavits, which were subject to the criminal sanction of 18 U. S. C. 1001, merely to avoid threshold Board inquiries into the Communist character of unions, and not, as petitioner suggests, for the purpose of precluding the Board from altering the union's compliance status should the falsity of the affidavit subsequently be established in either crimi-

nal or separate administrative proceedings. Such Board power of cancelling the union's compliance status is consistent with the scheme of Section 9 (h) and effectuates its purposes, and it also flows from the Board's general power to safeguard its processes from abuse.

Nor is this conclusion impaired by petitioner's assertion that cancellation of the union's compliance status on account of a false affidavit is not a practical or suitable sanction. The subsequent discovery that the union had not in fact complied with Section 9 (h) because an affidavit proves to be false results in no greater loss of past benefits and bargaining stability than the subsequent discovery that there has been noncompliance because not all of the required officers had filed affidavits (see *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322). Moreover, declaring the union to be non-compliant does not result in "guilt by association," because the action results not merely from the fact that the guilty officer is associated with the union, but from the union's failure to insure, as Congress desired, that it was in fact rid of Communist leaders.

## II

A majority of the court below properly rejected the union's contention that, even if the conviction on Gold's 1950 affidavit impaired Board benefits attributable to that affidavit, it did not affect the unfair labor practice order here, since, at the time the complaint was issued, Gold's 1951 affidavit was in effect.

The proceeding was, to some extent at least, dependent on Gold's 1950 affidavit, because it was in effect at the time the charge was filed, and the Board's rules, tightening the statutory period, require compliance with Section 9 (h) within 10 days of the filing of the charge.

In any event, the established fact that Gold had a fraudulent intent when he filed the first affidavit has relevant bearing on his intent when filing the 1951 affidavit. Moreover, the conviction on Gold's 1950 affidavit, having demonstrated that he was still a member of the Communist Party at that time, gives rise to a presumption of the continuation of such membership. For these reasons, and in the light of the special characteristics of the Communist Party and of membership therein, the court below was fully warranted in inferring from Gold's conviction on the 1950 affidavit that his 1951 affidavit was also untrue.

Such inference does not make the Section 9 (h) affidavit vulnerable as a bill of attainder. The basis of the inference is not the impermissible one (see *American Communications Association* v. *Douds,* 339 U. S. 382, 413–414) that, because Gold was once a Communist Party member, he always must be deemed to remain a member. Rather, it is that Gold's false statement about his change in membership in 1950 sheds light on his intention and status when he filed the 1951 affidavit.

Nor can it be contended that Gold's conviction on his 1950 affidavit was of no probative value because an appeal therefrom was pending. It is settled

that, when the jury returns a verdict of guilty, "the law now presumes the facts to be as the jury found them" (*United States* v. *Kawakita,* 96 F. Supp. 824, 835 (S. D. Cal.), affirmed 190 F. 2d 506 (C. A. 9), certiorari denied, 343 U. S. 717). Moreover, it is equally clear "that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its * * * finality" (*Huron Corp.* v. *Lincoln Co.,* 312 U. S. 183, 189).

III

The court below likewise properly rejected the Union's contention that principles of *res judicata* required it to follow the holding of the District of Columbia courts that the Board lacked power to alter the Union's compliance status on account of Gold's conviction. The employer herein (Lannom) was not a party, or in privity with any party, to the District of Columbia litigation, and thus would not be bound by the determination therein.

ARGUMENT

I

UNDER THE ACT, THE FALSITY OF A UNION OFFICER'S SECTION 9 (h) AFFIDAVIT AFFECTS THE UNION'S COMPLIANCE STATUS

In its brief in the companion case, *Leedom* v. *International Union of Mine, Mill and Smelter Workers,* No. 57, the Board has set forth the reasons why it believes that the veracity of a union officer's non-Communist affidavit under Section 9 (h) is relevant to its functioning, and why, should such falsity be established

either in criminal or separate administrative proceedings, the Act empowers the Board to cancel the union's compliance status and to invalidate benefits acquired on the basis of that officer's affidavits. These reasons are equally applicable here in dealing with the Union's initial contention (Br. 11–21) that the sole consequence under the Act of a false Section 9 (h) affidavit is a criminal penalty for the guilty union officer, and that such falsity has no effect on the union's right to Board benefits.

Thus, the Union's contention rests on two premises: (1) that the legislative history of Section 9 (h) conclusively shows that Congress intended to make a criminal penalty for the union officer the sole consequence of a false affidavit; and (2) that cancellation of the compliance status of the union would have such drastic consequences for the union and impose such a severe responsibility upon its members that it is not "a practical or a suitable sanction for conviction of an officer making a false affidavit" (Br. 16). Respecting the first premise, we have argued (Board Br. in No. 57, pp. 33–36) that this history merely shows that Congress decided on the affidavit technique to avoid threshold Board inquiries into the Communist character of unions, and not that Congress intended to preclude the Board, when the falsity of the affidavit is subsequently established in criminal or separate administrative proceedings, from altering the union's compliance status. Indeed, where, as here, the falsity of the officer's affidavit is established in criminal proceedings under 18 U. S. C. 1001, it is patent that the Board's power to alter the union's

status is not negated by the legislative history relied on by the Union. For, in this situation, the Board engages in no investigation of its own into the truth or falsity of the affidavit; the only investigation is made by the Department of Justice, and the denial of Board benefits is predicated on the conviction resulting therefrom. In short, the Board action occurs after the statutory role assigned to the Department of Justice has been fulfilled, and simply recognizes the conviction obtained by it for what it shows, *viz.*, that "what in form is an affidavit is merely a paper evidencing false swearing" (*National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873).[5]

The Union's second premise is equally unwarranted. As we have shown (Board Br. in No. 57, pp. 37–38), the subsequent discovery that the union had not in fact complied with Section 9 (h) because

[5] The excerpt from Chairman Herzog's testimony before the Senate Subcommittee in March, 1952, cited by the Union (Br. 14), does not foreclose the existence of Board power of "decompliance" *after* the falsity of the affidavit has been established in criminal proceedings. In a subsequent portion of the testimony, which the Union does not cite, Chairman Herzog was specifically asked what action the Board would take if the Department of Justice had obtained a criminal conviction against the officer, and he replied (Hearings before a Subcommittee of the Senate Labor Committee on Communist Domination of Unions and National Security, 82d Cong., 2d Sess., pp. 104–105):

"* * * That affidavit, if it is perjurious, certainly should not be regarded as a valid affidavit. * * * I have no doubt * * * that after conviction, and even pending appeal following the conviction, the Board would deny its processes to any union one of whose officers had been shown to have filed a perjured affidavit."

an affidavit proves to be false results in no greater loss of past benefits and bargaining stability than the subsequent discovery that there has been noncompliance because not all of the required officers had filed affidavits. These retroactive consequences are inherent in Section 9 (h) which, by requiring that there be valid affidavits on file as of the time a particular Board benefit is conferred, leaves no room for curing a past deficiency in compliance (*Ibid.*, p. 30). Just as such consequences were irrelevant to the question of whether there was full compliance with Section 9 (h) in the officer situation (*National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322), they are irrelevant to the question of whether noncompliance results when the falsity of the affidavit is established.

Nor does cancellation of the union's compliance status on account of a false affidavit result in "guilt by association," imposing a penalty and responsibility on the union and its members which Congress could not have intended. There is nothing in Congress' adoption of the affidavit technique which suggests that it intended to relieve the union, once its officers filed the required affidavits, of the responsibility to insure that it was in fact free of Communist officers. The original version of Section 9 (h), providing for initial Board determination of whether the union was under Communist control would have required the union fully to rid itself of such officers, and, if it had not, the union and its members would have been denied the benefits of the Act, no matter how "innocent" they may have been. Congress decided to use the affidavit technique, in-

stead, solely to avoid delaying Board proceedings and not to lessen the union's responsibilities after the affidavits had been filed (Board Br. in No. 57, pp. 33–37). Moreover, since the danger of "political strikes" from Communist union officers is as great where the rank-and-file are unsuspecting dupes as where they are conscious followers, it is inconceivable that Congress intended that the mere filing of affidavit should relax the union's vigilance.[6] Hence, the loss of the union's compliance status when the falsity of the officer's affidavit is established is not an instance of "guilt by association," a loss occasioned merely by the fact that the guilty officer is associated with the union; the loss, rather, is attributable to the union's own failure fully to eliminate Communist leaders, as Congress desired. There may be, as petitioner suggests (Br. 19–20), situations where the union would have difficulty in discovering whether an officer who has undertaken to file an affidavit is perpetuating a fraud, but neither here (where it reelected officer Gold as president despite knowledge of his conviction), nor in No. 57 (where it continued officer Travis in office despite his admission from the outset that his affidavit was false),[7] can it be said that the

[6] Petitioner assumes (Br. 17) that a jail sentence for the convicted officer "moots" the issue. But, should the union continue the officer in office while he is in jail (cf. the reelection of officer Gold after his conviction), the officer could keep on executing Section 9 (h) affidavits from jail; and the Board, if it lacked power to alter the union's compliance status based on the conviction, would be required to accept such affidavits as a basis for the union's continued compliance with the Act.

[7] Cf. the statement issued by officer Gold, R. 34, 36; *Gold* v. *United States*, No. 137, this Term, Brief for the United States in Opposition, pp. 14–15.

union has done all that it could to discharge its responsibility under Section 9 (h).

For these and the other considerations set forth in the Board's brief in No. 57, we submit that, under the Act, the conviction of a union officer for filing a false Section 9 (h) affidavit does affect the union's right to Board benefits.[8] Accordingly, we shall next discuss the Union's remaining contentions that: (1) Gold's conviction on his 1950 affidavit nevertheless afforded no basis for invalidating the instant unfair labor practice proceeding; and (2) the court below was precluded from taking into account Gold's conviction because of the prior judgment of the District

[8] We do not urge, as the court below suggested (R. 18), that, even if the Board lacked power under the Act to alter a union's compliance status where an officer's affidavit proved false, the court's power in this respect was broader. We believe that the court's power in respect to Board orders is limited to that conferred by Sections 10 (e) and (f) of the Act, and, as we read those provisions, they merely vest the court with a reviewing jurisdiction over Board action and do not authorize it to exceed such action. Cf. *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 342–343; *National Labor Relations Board* v. *Warren Co.*, 350 U. S. 107; *United States* v. *Morgan*, 307 U. S. 183, 191. Indeed, it is at least arguable that, where the officer's conviction for filing a false Section 9 (h) affidavit first comes to light while the Board unfair labor practice case is before the Court of Appeals for review or enforcement, the proper course for the court would be to remand the case to the Board to determine the effect of the conviction on the union's compliance status in separate administrative proceedings, rather than to make an initial determination of this question itself. A remand in this case, however, would have served no purpose, for the Board had made a separate administrative determination that Gold's conviction invalidated the union's compliance status, but had been enjoined by the District of Columbia courts from giving effect to this determination (p. 6, *supra*).

of Columbia courts that the Board lacked power to do so.

## II

### THE CONVICTION ON GOLD'S 1950 AFFIDAVIT WARRANTED INVALIDATION OF THE UNFAIR LABOR PRACTICE PROCEEDING

The facts summarized in the Statement (pp. 3–4) show that, although the Union's initial and first amended unfair labor practice charge were filed during the period when the Union's compliance status depended on Gold's 1950 affidavit, the unfair labor practice complaint was not issued until February 1952, by which time Gold's 1951 affidavit was in effect. Since *National Labor Relations Board* v. *Dant,* 344 U. S. 375, holds that, in unfair labor practice cases, Section 9 (h) requires compliance at the time the complaint issues and not when the charge is filed, the Union concludes that the validity of Gold's 1950 affidavit is irrelevant to this proceeding. That is, even if Gold's conviction established the falsity of his 1950 affidavit and resulted in a nullification of all Board benefits attributable to that affidavit, the unfair labor practice order here was dependent, not on that affidavit, but on Gold's 1951 affidavit, which was not affected by the conviction (Br. 21–22). We submit that a majority of the court below properly rejected this contention.

1. The instant proceeding was, to some extent at least, dependent on Gold's 1950 affidavit. Although the terms of Section 9 (h) do not require compliance in unfair labor practice cases before the complaint issues, this Court recognized in *Dant,* 344 U. S. 375, 380–382,

that the Board is empowered to and has tightened this period by rule,[9] requiring compliance with Section 9 (h) within 10 days of the filing of the charge. Accordingly, had Gold's 1950 affidavit not been on file within 10 days of the filing of the charge herein, or had the falsity of that affidavit been established within that period, it seems clear that the Union's unfair labor practice charge would have been dismissed. The mere fact that the falsity of the affidavit is not discovered until later should not put the Union in any better position than it would have been in had the falsity appeared earlier.

2. Assuming that the instant proceeding hinged only on the 1951 affidavit, the court below correctly concluded that Gold's conviction on the 1950 affidavit was relevant, insofar as the Board proceeding was concerned, in assessing the validity of his 1951 affidavit. The established fact that Gold had a fraudulent intent when he filed the 1950 affidavit sheds light on his intent when filing the 1951 affidavit. As stated by Judge Learned Hand, when "intent * * * is an issue it is always permissible, even in civil actions and criminal prosecutions, to show that the actor had been engaged in other similar transactions. Wigmore § 302. The rationale of this is that if the disputed intent was present on the earlier occasions, it was likely to have been present upon that under inquiry, because the disposition then shown to exist was likely to persist." *National Labor Relations Board* v. *National Seal Corp.*, 127 F. 2d 776, 778 (C. A. 2). More-

[9] C. F. R. § 101.3 (b), set forth at pp. 47–48 of the Board's brief in No. 57.

over, the conviction on Gold's 1950 affidavit, having demonstrated that he was still a member of the Communist Party at that time, gives rise to a presumption of the continuation of such membership. For, as pointed out by the court in *National Labor Relations Board* v. *Piqua Munising Wood Products,* 109 F. 2d 552, 554 (C. A. 6), in sustaining the Board's inference that union membership cards signed two years earlier evidenced current membership: "It is a well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter." See also Wigmore on Evidence § 2530.

These inferences appear particularly justified in the light of the special characteristics of the Communist Party and of membership therein. The court below noted that (R. 19):

> In his separate opinion in *American Communications Association* v. *Douds,* 339 U. S. 382, Justice Jackson pointed out (p. 432) the differences between the Communist Party and the major political parties in the United States, that membership in it is totally different from membership in the usual political party, and that *inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party.* He wrote: "The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrina-

> tion in its policies, to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that identification can only be made by officers of the Party who hold the code. Moreover, each pledges unconditional obedience to party authority. * * * For any deviation from the party line they are purged and excluded." See also similar expressions of views by Chief Justice Vinson, Justice Frankfurter and Justice Jackson in *Dennis* v. *United States,* 341 U. S. 494, at pages 498, 547 and 564 respectively. [Emphasis in original.]

Similarly, as is shown in the Board's brief in No. 57 (pp. 31–32, fn. 24), it is now clear that the Communist Party has long followed the policy of having its members "formally resign" without in fact severing Party ties, and that this policy was specifically adopted in respect to Section 9 (h) affidavits.

To infer from Gold's conviction on the 1950 affidavit that his 1951 affidavit is also untrue does not, as the Union and the dissenting judge (Br. 21–22; R. 21) assert, make the Section 9 (h) affidavit vulnerable as a bill of attainder. In *American Communications Association* v. *Douds,* 339 U. S. 382, 413–414, this Court rejected the bill of attainder contention because it viewed the affidavit as not penalizing past conduct; i. e., "members of those groups identified in § 9 (h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past" (*Id.,* at 414). Consistent with this holding, the mere fact that Gold may have been a member of the Com-

munist Party in 1949 does not preclude him from making a *bona fide* resignation in 1950 and filing an affidavit to this effect; nor would the fact that he was a member of the Party in 1950, by itself, negate an affidavit in 1951 that he was not then a member. However, when it is established that Gold lied when he filed his 1950 affidavit, there is no reason to assume, in the absence of evidence to the contrary, that he took his 1951 affidavit any more seriously. Accordingly, the burden then shifts to the Union to demonstrate, by something more than the now inconclusive circumstance that Gold filed a further affidavit, that the conditions which showed he was lying in 1950 did not continue to exist in 1951.[10]

In short, the basis of the inference indulged in by the court below is not the impermissible one that, because Gold was once a Communist Party member, he always must be deemed to remain a member; rather, it is that Gold's falsehood about his change in membership in 1950 sheds light on his intention and status when he filed the 1951 affidavit. As the Court recognized in *Douds*: "Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be" (339 U. S. at 413–414). Just as Congress, in enacting Section 9 (h), could properly infer that a union officer who was a member of the Communist Party was likely to engage in political strikes in the future (339 U. S. at 391), it was reasonable for the court

[10] The Union made no such showing, either before the court below in this proceeding or in the Board's administrative proceeding (p. 6).

below to conclude, particularly on the record herein, that Gold, having given false oath as to his 1950 Party membership, also did the same as to his 1951 membership.

There remains for consideration the Union's further contention (Br. 23) that Gold's conviction on his 1950 affidavit afforded no basis for an inference because, since an appeal therefrom had been taken and Gold had been placed on bail during its pendency, the falsity of the 1950 affidavit was itself still in question. Preliminarily, it may be noted that, after the decision herein, the conviction was affirmed by an equally divided vote of the Court of Appeals sitting en banc, and, on October 8, 1956, this Court granted Gold's petition for certiorari, No. 137, this Term.[11] In any event, we submit that the Union's contention is without merit.

It is settled that, when the jury returns a verdict of guilty, "the law now presumes the facts to be as the jury found them" (*United States* v. *Kawakita,* 96 F. Supp. 824, 835 (S. D. Cal.), affirmed 190 F. 2d 506 (C. A. 9), certiorari denied 343 U. S. 717); "the presumption of innocence vanishes and a heavy presumption of guilt supplants it" (*United States* v. *Burgman,* 89 F. Supp. 288, 289 (D. D. C.)). It is equally clear "that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its * * * finality" (*Huron Corp.* v. *Lincoln Co.,* 312 U. S. 183, 189). Accordingly, a criminal conviction, notwith-

[11] As noted in fn. 4, p. 6, *supra*, after the grant of certiorari, the Board moved the Court to postpone argument in the instant case, pending the Court's decision in the conviction case, but, on October 22, 1956, the Court denied this motion.

standing the pendency of an appeal therefrom, is sufficiently final for purposes of revoking citizenship (*United States* v. *Bridges*, 90 F. Supp. 973, 974–975 (N. D. Cal.), conviction itself subsequently set aside, 346 U. S. 209), and it furnishes sufficient basis for disbarment of an attorney (Freeman on Judgments, 5th ed., p. 1383, fn. 2). In this light, the court below was fully warranted in concluding that the falsity of Gold's 1950 affidavit was sufficiently established by the judgment of conviction which had been returned in the District Court.

## III

### THE COURT BELOW WAS NOT PRECLUDED FROM TAKING INTO ACCOUNT GOLD'S CONVICTION BECAUSE OF THE PRIOR HOLDING OF THE DISTRICT OF COLUMBIA COURTS THAT THE BOARD LACKED POWER TO DO SO

The record before the court below set forth, without dispute, the facts respecting Gold's conviction,[12] tendering only a legal issue as to effect of the conviction on the validity of this proceeding. In the circumstances of this case (see fn. 8, p. 16, *supra*), the situation was thus like the prior cases where legal questions respecting the sufficiency of union compliance with Section 9 (h) have been raised by respondents to unfair labor practice proceedings,[13] accordingly, the court be-

[12] It is immaterial that these facts, having come to light after the Board's order had issued, were first set forth in the Board's petition for enforcement. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 428, 431.

[13] *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322; *National Labor Relations Board* v. *Dant*, 344 U. S. 375; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U. S. 264.

low was empowered to resolve this issue, and, if it found that compliance was defective, to deny enforcement of the Board's order. "It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct" (*National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325).

This conclusion is not impaired by the Union's contention (Br. 24–26) that principles of *res judicata* required the court below to follow the holding of the District Court for the District of Columbia, subsequently affirmed by the Court of Appeals for that Circuit (p. 6, *supra*), that the Board lacked power to alter the Union's compliance status on account of Gold's conviction. As the court below noted (R. 20):

> Although the District Court enjoined the Board from revoking the compliance status of the Union by reason of [Gold's conviction], the injunction does not run against the respondent [Lannom] herein, who was not a party to that action, and does not render the present proceeding *res judicata*. *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U. S. 464, 476; *Swetland* v. *Curry*, 188 F. 2d 841, 843, C. A. 6th.[14]

There is no basis for the Union's fear (Br. 25) that, if Lannom were able to question the validity of Gold's

[14] See also, *Privett* v. *United States*, 256 U. S. 201, 203–204; Rule 65 (d) Federal Rules of Civil Procedure. A further reason militating against *res judicata* is that the District Court merely issued a preliminary injunction. Cf. *United States* v. *United States Smelting, et al.*, 339 U. S. 186, 198–199.

affidavits in this proceeding, so could employers in every unfair labor practice proceeding challenge the veracity of Section 9 (h) affidavits, with the result that such proceedings would be bogged down with these collateral issues. Were this Court to find, contrary to the view of the District of Columbia courts, that the falsity of Section 9 (h) affidavits is relevant to the Board's functioning, the Board would be free to resume its practice of handling these questions in separate administrative proceedings, and thus there would be no occasion for going into these matters in particular unfair labor practice or representation cases. See *Coca-Cola Bottling Co. of Louisville,* 108 N. L. R. B. 490, 491. Nor, as the Union suggests (Br. 25), is this view inconsistent with our contention that *res judicata* principles are inapplicable here. Although such an administrative compliance determination would preclude a party from reopening the compliance question in a subsequent unfair labor practice case, the compliance determination is not *res judicata* as to him, for he is not barred from requesting the Board, on the basis of information not previously considered by it, to conduct a new administrative investigation into the compliance question, and the Board, of course, is free to do so.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.[15]

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[15] But cf. fn. 8, p. 16, *supra*.

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